

REMARKS

Claim Status

Claims 1-13 are pending in the present application, Claim 14 is canceled by the present amendment. Claim 1 is amended. Support for the amendment to claim 1 is found on the last line of page 11. No new matter is added and no additional claims fee is believed to be due.

Rejection Under 35 USC §103(a) Over Tachibana in view of Tchinnis

Claims 1-10 and 12-14 have been rejected under 35 USC §103(a) as being unpatentable over Tachibana *et al.* (US 5,412,004) in view of Tchinnis. Claim 14 has been canceled.

The Office states that Tachibana does not teach the size distribution of the droplets as claimed herein and applies Tchinnis to make up for this deficiency. But the droplet size in Tchinnis must be less than 1 micron, see for example, the Abstract, Column 3, lines 45-52, and all of the claims. The claims of the present invention have amended to require that at least 10% of the droplets be greater than 40 microns and at least 10% of the particles be greater than 60 micron, in addition to the average droplet size being between 0.1 and 100 microns. As amended herein, the droplet size of the present claims are not taught by Tchinnis. Moreover, the claimed droplet size would violate the teachings of Tchinnis, which *requires* that *all* particles be less than 1 micron (and preferably less than 800nm).

Accordingly, Tchinnis does not make up for the deficiencies of Tachibana. Moreover in response to the prior Office Action the Applicant submitted the November 2, 2007 Sunkel Declaration, made pursuant to 37 CFR 1.132. Sunkel asserts that it is not within the ordinary skill in the art to select the droplet size and particle size disclosed in the claimed composition. A formulator needs prior knowledge of the physical dimensions of the emulsifying composition he or she is working with and cannot rely on mixing or agitation energy, for example, to formulate within a given droplet size, because with large emulsifying silicone gel particles, no matter how much or how strong the mixing, ultimately droplets are going to coalesce to a size that the gels can stabilize by packing around the drop. See Sunkel Declaration, page 2. The claimed particle size and distribution of the stable multiphase emulsion composition influence not only droplet size, but also sensory benefits. Thus, these features are critical to the present composition; they

are not simply optimal parameters one of ordinary skill in the art would select. The Applicants hope that the Examiner will find the Sunkel Declaration more persuasive in light of the present amendments.

Further, the present specification is replete with explanations why the droplet size is critical to the present invention, which explanations are diametrically opposed to the small droplet size taught in Tchinnis. For example:

The discontinuous phase, preferably, forms droplets having a droplet size distribution range of from about 0.1 microns to about 100 microns. More preferably the discontinuous phase droplets have a droplet size distribution range such that at least 20%, preferably 15%, more preferably 10% of the droplets have a droplet size of greater than 40 microns, more preferably greater than 60 microns, most preferably greater than 75 microns, and optimally greater than 40 microns. *See* specification page 11, line 30 – page 12, line 2.

Tachibana neither identifies a need to prevent agglomeration of the solid particles in a cosmetic product or upon application to the skin, such as in fine lines and wrinkles, nor does Tachibana disclose a manner of accomplishing the same. Tachibana simply addresses the need to increase viscosity of a composition. Thus, there is no motivation or suggestion to modify the Tachibana composition to arrive at the claimed composition.

In view of the above, Applicants submit that claim 1, and the claims depending therefrom, are patentably distinct from Tachibana in view of Tchinnis and Applicants request withdrawal of the rejection.

Rejection Under 35 USC §103(a) Over Tachibana in view of Tchinnis and Hawley

Claim 11 is rejected under 35 USC §103(a) as being unpatentable over Tachibana in view of Tchinnis as applied to claims 1-10 and 12-14 and further in view of Hawley, G.G., The Condensed Chemical Dictionary, 10<sup>th</sup> Ed., Van Nostrand Reinhold Co., New York (1981), pages 121, 385, 434, and 686 (hereafter “Hawley”).

The Office believes that Hawley teaches the preservatives that are lacking in the disclosures of Tachibana and Tchinnis and it would have been obvious to one of ordinary skill in the art at the time of the invention to add any one of the preservatives disclosed in Hawley to the composition of Tachibana and Tchinnis for their known antimicrobial

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effects. Applicants respectfully traverse this rejection as the combined references do not teach or suggest all of the claim limitations.

The Office Action does not establish a *prima facie* case because, as explained above, the combination of Tachibana and Tchinnis fails to disclose the requisite limitations of Applicants' invention that deal with droplet size distribution. The mere addition of Hawley's disclosure of commonly used preservatives fails to remedy this shortcoming. Accordingly, Applicants respectfully assert that Hawley's disclosure of alleged well-known preservatives when viewed in combination with Tachibana and Tchinnis would not have rendered Applicants' invention obvious since none of the benefits of the claimed composition are taught, suggested, or even recognized by the combination of references.

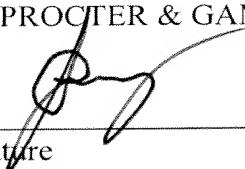
In view of the above, Applicants submit that claim 11 is patentably distinct from Tachibana, Tchinnis and Hawley and Applicants request withdrawal of the rejection.

#### Conclusion

Applicants have made an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied references. In view of the foregoing, Applicants respectfully request entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims.

Respectfully submitted,  
THE PROCTER & GAMBLE COMPANY

By \_\_\_\_\_

  
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